Mutual Mining, Inc. and Johnny Porter d/b/a Mutual Mining, Inc. *and* District 17, United Mine Workers of America and United Mine Workers of America and United Mine Workers of America, District 17, Local Union 5817 and Gary J. Moore. Cases 9–CA–29280, 9–CA–30659, 9–CA–31795, 9–CA–30305, 9–CA–33131, 9–CA–32061, and 9–CA–33013

October 31, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Upon charges filed on January 30, 1992, January 11 and May 5, 1993, April 18 and August 5, 1994, and July 31, 1995, the General Counsel of the National Labor Relations Board issued a third consolidated complaint on November 14, 1995, against Mutual Mining, Inc. and Johnny Porter, d/b/a Mutual Mining, Inc., a respondent, in Cases 9–CA–29280, 9–CA–30659, 9–CA–31795, 9–CA–30305, 9–CA–33131, and 9–CA–32061, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. In addition, on charges filed on June 16, 1995, in Case 9–CA–33013 the General Counsel of the National Labor Relations Board issued a complaint on July 27, 1995, against Mutual Mining, Inc., a respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act.

Mutual Mining, Inc. and Johnny Porter, d/b/a Mutual Mining, Inc. (the Respondent) did not file an answer to the third consolidated complaint or the complaint in Case 9–CA–33013. Although the Respondent did file answers to prior complaints issued by the General Counsel containing some of the same allegations, on August 2, 1996, the Respondent withdrew those answers.

On September 27, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On October 1, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of a complaint, unless good cause is shown. In addition, the complaints affirmatively note that unless an answer is filed within 14 days of service, all the allegations therein will be considered admitted. Here, according to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent either failed to file any answer or withdrew its answers to the allegations in the complaints.[1]

Accordingly, in the absence of good cause being shown otherwise, we grant the General Counsel's Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times prior to November 2, 1993, Mutual Mining, Inc. (Respondent Mutual), a corporation, with an office in Sandy Hook, Kentucky, has been engaged as a contractor in surface mine operations at Island Creek Coal Company's West Virginia mines. Since about November 2, 1993, Respondent Mutual has been owned by Johnny Porter (Respondent Porter), a sole proprietorship, doing business as Mutual Mining, Inc., has functioned as a disguised continuation of Respondent Mutual, has been an affiliated business enterprise with common ownership, management, and supervisor, and has been engaged as a contractor in surface mining operations at Island Creek Coal Company's West Virginia mines. Based on this conduct, Respondent Mutual and Respondent Porter are, and have been at all times, alter egos and a single employer within the meaning of the Act.

During the 12-month period preceding issuance of the complaints, the Respondent, in conducting its operations, performed services valued in excess of $50,000 for Island Creek Coal Company at its West Virginia mines. At all material times, Island Creek, a corporation, has been engaged in the mining, processing, and sale of coal at various West Virginia locations. During the 12-month period preceding issuance of the complaints, Island Creek sold and shipped from its West Virginia locations goods valued in excess of $50,000 directly to points outside the State of West Virginia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that District 17, United Mine Workers of America; United Mine Workers of America (UMWA); and United Mine Workers of America,

[1] The withdrawal of an answer has the same effect as a failure to file an answer, i.e., all allegations in the various complaints must be considered to be true. See *Maislin Transport*, 274 NLRB 529 (1985).

[2] In its August 2, 1996 letter withdrawing its answers, the Respondent asserts that it has "closed its doors and is no longer a viable financial enterprise." The fact that a respondent may no longer be in business or has terminated its operations does not constitute good cause for failing to file an answer and is not a basis for denying the Motion for Summary Judgment. See, e.g., *Beaumont Glass Co.*, 316 NLRB 35 fn. 1 (1995).

District 17, Local Union 5817 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times the Respondent and UMWA have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of the Respondent.

About December 17, 1992, John Taylor, an employee and member of the UMWA's Mine Health and Safety Committee, made a safety complaint to the Respondent relating to the collective-bargaining agreement. About December 18, 1992, the Respondent's employees also filed a safety complaint with the Mine Safety and Health Administration. About December 21, 1992, the Respondent laid off employees John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney because these employees and the UMWA filed these safety complaints and to discourage employees from engaging in these or other concerted activities.

About March 20, 1995, the Respondent again laid off its employee Gary Moore because he filed grievances in an attempt to enforce his rights under the collective-bargaining agreement in effect between UMWA and the Respondent, and to discourage employees from engaging in these activities.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Respondent engaged in the production of coal, including removal of overburden and coal waste, preparation, processing, cleaning of coal and transportation of coal (except by waterway or rail not owned by the Respondent), repair and maintenance work normally performed at the mine site or at a central shop of the Respondent and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above at the coal lands, coal producing and coal preparation facilities owned or operated by the Respondent excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards, and supervisors as defined in the Act.

Since about May 22, 1989, and at all material times, the UMWA has been the designated exclusive collective-bargaining representative of the unit, and since then the UMWA has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements between the Respondent and UMWA on behalf of its locals and districts including District 17 and Local 5817, the most recent of which is effective December 16, 1993, through August 1, 1998 (the 1993–1998 agreement). At all times since May 22, 1989, based on Section 9(a) of the Act, the UMWA has been the exclusive collective-bargaining representative of the unit.

About November 14 and 20, 1991, and March 24 and April 12, 1993, the UMWA, by letter, requested that the Respondent furnish it with certain information which is necessary for and relevant to the UMWA's performance of its duties as the exclusive collective-bargaining representative for the unit, and since those dates, the Respondent has failed and refused to furnish the UMWA with the requested information.

About January 26, 1994, the Respondent and UMWA entered into the 1993–1998 agreement covering the unit employees. Since about December 16, 1993, the Respondent has failed to continue in effect all the terms and conditions of this agreement by failing to remit dues and assessments to the UMWA pursuant to article XV of that agreement and by failing to provide health insurance benefits to unit employees pursuant to article XX of that agreement. These terms and conditions of employment are mandatory subjects for the purposes of collective bargaining.

The 1993–1998 agreement contains a grievance/arbitration procedure. Pursuant to this grievance/arbitration procedure, Local 5817, which has been designated to service the contract, has filed grievances, including Grievance Nos. 94-148, 94-207, 94-260 and 94-414. About April 4, 1994, the Respondent agreed to settle Grievance No. 94-148 by paying affected employees for losses incurred due to contractors allegedly performing bargaining unit work. About August 5, 1994, the Respondent agreed to settle Grievance No. 94-207 by paying the affected employee one (1) shift's pay for the loss incurred as a result of a 3-day suspension. About August 17, 1994, the Respondent agreed to settle Grievances Nos. 94-260 and 94-414 by paying affected employees for losses incurred due to nonbargaining unit employees performing bargaining unit work. These grievance settlements were reached pursuant to the terms and conditions of the grievance/arbitration procedure of the collective-bargaining agreement prior to arbitration. Since April 4 and August 5 and 17, 1994, respectively, the Respondent failed and refused to honor and implement these settlements.

About June 9, 1995, the Respondent ceased mining coal at the Island Creek Coal Company's West Virginia mines and terminated unit employees. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The

Respondent engaged in this conduct without prior notice to the UMWA and without affording the UMWA an opportunity to bargain with the Respondent with respect to the effects of this conduct.

CONCLUSIONS OF LAW

By laying off employees John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act. By engaging in the remaining conduct set forth above, the Respondent has been failing and refusing to bargain collectively and in good faith within the meaning of Section 8(d) of the Act with the exclusive representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) by laying off John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the layoffs.[3] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful layoffs, and to notify the laid-off employees in writing that this has been done.

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to provide the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union the information requested.

Furthermore, having found that the Respondent also violated Section 8(a)(5) and (1) by failing to remit to the Union dues and assessments pursuant to article XV of the 1993–1998 agreement, we shall order the Respondent to remit such dues and assessments to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having also found that the Respondent has violated Section 8(a)(5) and (1) by failing to provide health insurance benefits to its unit employees pursuant to article XX of the 1993–1998 agreement, we shall order the Respondent to restore the employees' health insurance benefits and make the employees whole by reimbursing them for any expenses ensuing from the Respondent's unlawful conduct, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra.

Having further found that the Respondent has failed and refused to honor and implement the settlements reached on the various grievances, we shall order the Respondent to make the agreed-on payments to the respective unit employees, with interest as prescribed in *New Horizons for the Retarded*, supra, or as provided in the settlements.

Finally, as a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to cease mining coal at the Island Creek Coal Company's West Virginia mines, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects on its employees of its ceasing mining coal at the Island Creek Coal Company's West Virginia mines, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days

[3] We shall leave to the compliance stage of the proceeding any issue of whether any jobs exist to which the laid-off employees would be entitled to be reinstated.

after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects on its employees of its ceasing to mine coal at the Island Creek Coal Company's West Virginia mines; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Mutual Mining, Inc. and Johnny Porter d/b/a Mutual Mining, Inc., Sandy Hook, Kentucky, a single employer and alter egos, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees because they or the UMWA file safety complaints or to discourage employees from engaging in these or other concerted activities.

(b) Failing to furnish the Union with requested information that is necessary for and relevant to the UMWA's performance of its duties as the exclusive collective-bargaining representative for the following unit:

> All employees of the Respondent engaged in the production of coal, including removal of overburden and coal waste, preparation, processing, cleaning of coal and transportation of coal (except by waterway or rail not owned by the Respondent), repair and maintenance work normally performed at the mine site or at a central shop of the Respondent and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above at the coal lands, coal producing and coal preparation facilities owned or operated by the Respondent excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

(c) Failing to continue in effect all the terms and conditions of the 1993–1998 collective-bargaining agreement by failing to remit dues or assessments to the UMWA pursuant to article XV of the agreement or by failing to provide health insurance benefits to unit employees pursuant to article XX of the agreement.

(d) Failing or refusing to honor or implement settlements reached with the collective-bargaining representative of its unit employees pursuant to the terms and conditions of the grievance/arbitration procedure of the collective-bargaining agreement.

(e) Ceasing to mine coal at the Island Creek Coal Company's West Virginia mines and terminating unit employees without prior notice to the Union and without affording it an opportunity to bargain with the Respondent with respect to the effects of this conduct.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney whole for any loss of earnings and other benefits suffered as a result of the layoffs in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful layoffs, and within 3 days thereafter notify the discriminatees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Furnish the Union the information it requested on November 14 and 20, 1991, and March 24 and April 12, 1993.

(e) Remit to the Union, with interest, the dues and assessments required by article XV of the 1993–1998

agreement that it failed to remit since December 16, 1993.

(f) Restore the unit employees' contractually required health insurance benefits and make the unit employees whole for the failure to provide such benefits since December 16, 1993, in the manner set forth in the remedy section of this decision.

(g) Honor and implement the settlements reached on the various grievances, pursuant to the collective-bargaining agreement, and make the respective unit employees whole in the manner set forth in the remedy section of this decision.

(h) On request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of its decision to cease mining coal at the Island Creek Coal Company's West Virginia mines and to terminate unit employees, and reduce to writing any agreement reached as a result of such bargaining.

(i) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision.

(j) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facilities in Logan County, West Virginia, and Sandy Hook, Kentucky, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 1992.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off our employees because they or the United Mine Workers of America file safety complaints or to discourage employees from engaging in these or other concerted activities.

WE WILL NOT fail to furnish the Union with requested information that is necessary for and relevant to its performance of its duties as the exclusive collective-bargaining representative for the unit:

> All our employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing, cleaning of coal and transportation of coal (except by waterway or rail not owned by us), repair and maintenance work normally performed at the mine site or at a central shop of ours and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above at the coal lands, coal producing and coal preparation facilities owned or operated by us excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to continue in effect all the terms and conditions of the 1993–1998 collective-bargaining agreement by failing to remit dues or assessments to the UMWA pursuant to article XV of the agreement or by failing to provide health insurance benefits to unit employee pursuant to article XX of the agreement.

WE WILL NOT fail or refuse to honor or implement settlements reached with the Union pursuant to the terms and conditions of the grievance/arbitration procedure of the collective-bargaining agreement.

WE WILL NOT cease to mine coal at the Island Creek Coal Company's West Virginia mines or terminate unit employees without prior notice to the Union or without affording it an opportunity to bargain with us with respect to the effects of this conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order, offer John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David

Tenney full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney whole, with interest, for any loss of earnings and other benefits suffered as a result of the layoffs, in the manner set forth in a decision of the National Labor Relations Board.

WE WILL, within 14 days from the date of this Order, remove from our files any and all references to the unlawful layoffs of John Taylor, Willis Hill Jr., Clark Williamson, Sam Coyle, John McKenzie, Robert Lewis, Cletis Wamsley, Tommy Cochran, Johnny Givens, Russell Phillips, Gary Moore, and David Tenney, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL furnish the Union the information it requested on November 14 and 20, 1991, and March 24 and April 12, 1993.

WE WILL remit to the Union, with interest, the dues and assessments required by article XV of the 1993–1998 agreement that we have failed to remit since December 16, 1993.

WE WILL restore the unit employees' contractually required health insurance benefits and make them whole for our failure to provide those benefits since December 16, 1993, in the manner set forth in a decision of the National Labor Relations Board.

WE WILL honor and implement the settlements reached on the various grievances, pursuant to the collective-bargaining agreement, and make the respective unit employees whole in the manner set forth in a decision of the National Labor Relations Board.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of our decision to cease mining coal at the Island Creek Coal Company's West Virginia mines and to terminate unit employees, and reduce to writing any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in a decision of the National Labor Relations Board.

MUTUAL MINING, INC. AND JOHNNY PORTER D/B/A MUTUAL MINING, INC.